IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision: December 22, 2006

(1) Criminal Appeal No.969-SB of 2002

Ram Paul Singh Vs. State of Punjab

(2) Criminal Appeal No.1274-SB of 2002.

Gurcharan Singh Vs. State of Punjab

(3) Criminal Appeal No.793-SB of 2006

Amarjit Kaur Vs. State of Punjab

CORAM: **Hon'ble Mr. Justice Virender Singh**

Present: Mr. R.S. Mamli, Advocate, for Appellant Ram Paul Singh.
Mr. G.S. Bhatia, Advocate, for Appellant Gurcharan Singh.
Mr. JS Bains, Advocate, for Appellant Amarjit Kaur.

Mr. M.S. Sidhu, Sr. Deputy Advocate General, Punjab
for the respondent in all the three cases.

Virender Singh, J.

Vide this judgment, I shall be disposing of all the aforesaid three appeals in which the appellants are stated to be in custody. They stand convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act (for short to be referred to as 'the Act'), vide impugned judgment of learned Special Judge, Moga, dated 8.4.2002 and have been

sentenced to undergo R.I. for ten years each and to pay a fine of Rs.1.00 lac each, in default of payment of fine to further undergo R.I. for one year, for allegedly keeping in their conscious possession 5 bags of poppy husk when they were apprehended by Joginder Singh (PW2) who along with his other police officials was present on the bridge of canal minor in the area of village Nathuwala on 8.5.1997 at about 9.00 P.M. in the area falling within the jurisdiction of Police Station Baghapurana (District Moga) while travelling in a jeep Commander Make bearing registration No.UP-80B-9222.

Aggrieved by the impugned judgment of conviction and sentence, they have preferred the present three appeals separately.

I may mention here that Amarjit Kaur had filed her separate appeal (Appeal No.973-SB of 2006) with a delay of 1392 days which was condoned keeping in view the fact that the other two appeals filed by her co-accused stood already admitted. Gurcharan Singh appellant who had filed his appeal through jail and is being represented by Mr. Bhatia as Amicus-Curiae.

In brief, the case of the prosecution is that on 8.5.1997 when Inspector/SHO Joginder Singh along with other police officials was present on the bridge of canal minor situated on Mudhki-Baghapurana Road in connection with Nakabandi, at 9.00 P.M. he saw a jeep coming from the side of Mudhki, bearing registration No.UP-80B-9222. It was got stopped with the help of torch light. Appellant Ram Paul Singh was seen on the

steering of the jeep while other two appellants were sitting besides him. S.I. Joginder Singh wanted to search the vehicle in question and, therefore, apprised all the appellants of their rights with regard to the search being conducted in the presence of a Gazetted Officer or a Magistrate but all the three reposed confidence in him. Three different consent memos were prepared in this regard. Lady Constable Mohinderjit Kaur and Paramjit Kaur from Moga were called who arrived at the spot after some time. Thereafter, the search of the jeep was conducted which led to the recovery of five bags containing poppy husk. 250 grams of poppy husk were separated from each bag as a sample and the remaining poppy husk on weighment in each bag turned out to be 35 Kgs. All the five samples and the five gunny bags were then converted into parcels with the seal bearing the seal inscription 'JS' (Inspector Joginder Singh). The case property along with jeep were taken to the Police Station vide separate recovery memos which was attested by the police officials. The personal search of all the three appellants was conducted. A ruqa was sent to the police station upon which formal FIR was registered in P.S. Baghapurana. Registration certificate of the jeep was also taken into possession vide separate recovery memo. The sample of the seal was retained by the police. The rough site plan of the place of recovery was also prepared. All the three appellants were intimated of the grounds of their arrest vide arrest memos. On the following day i.e. 9.5.87, Inspector Joginder Singh produced all the appellants, the case property alongwith the jeep before the Ilaqa Magistrate,

Moga and made a formal request for obtaining the orders with regard to depositing of the case property and after obtaining the requisite orders, the case property was deposited with MHC of Police Station Baghapurana. A special report was sent to D.S.P. Nihal Singh Wala (camp at Baghapurana). After the receipt of the report from FSL, the investigation was completed and all the three appellants were challaned. They were charged under Section 15 of the Act by the learned Special Judge.

The prosecution in order to prove the charge, had produced the following witnesses:-

PW-1 Jagsir Singh son of Tara Singh- He was the owner of the jeep in question and stated that he had purchased it from one Gurpal Singh of village Panuala and got the same transferred in his name. He further stated that he had neither given the jeep to any one nor it was used as taxi. He was declared as a hostile by the prosecution when he was confronted with his previous statement.

PW-2 Inspector Joginder Singh (SI/SHO of P.S. Baghapurana)- He is the Investigating Officer of this case. The investigation conducted by him has already been alluded to by me in the preceding para.

PW-3 ASI Harpreet Singh- He is also a witness to the recovery and had reiterated the case of the prosecution with regard to all the formalities completed at the spot.

PW-4 Head Constable Sukhwant Singh- He is a witness of formal nature who tendered his affidavit Ex.PM to prove the link evidence.

PW-5 Tara Chand LC No.198-Moga- He is also a witness of link

evidence who was handed over five sample parcels for depositing the same with the Director of Forensic Science Laboratory.

PW-6 Constable Khem Chand – He had handed over the special report to the senior police officials including Ilaqa Magistrate.

PW-7 Mahesh Kumar Clerk of DTO Office Moga- He had proved the ownership of Jeep No.UP-80B-9292 which stood in the name of Jagsir Singh son of Tara Singh, resident of Langiana (District Faridkot).

PW-8 ASI Ranjit Singh - He had proved the receipt of the special report sent by Joginder Singh, the Investigating Officer.

The prosecution had also tendered the report of the FSL.

The stand taken by the appellants is of false implication. Ram Paul Singh appellant pleaded that he never remained as driver of the jeep. Gurcharan Singh appellant also pleaded false implication stating that he was not the occupant of the jeep. So was the plea of Amarjit Kaur appellant.

In defence, Iqbal Singh son of Karnail Singh (DW1) stepped into the witness-box for Ram Paul Singh appellant and deposed that the police party came to the village and picked up Ram Paul Singh from there and when they approached Harpreet Singh ASI, who had come to the village, it was disclosed that a jeep was taken into custody and the police was suspecting Ram Paul Singh to be the driver of the said jeep.

Chowkidar Hakam Singh son of Bara Singh (DW2) also deposed in favour of Ram Paul Singh in the same manner.

Baljinder Singh son of Gopal Singh, Member Panchayat (DW3)

deposed that after Ram Paul Singh appellant was lifted by the police, he alongwith others had approached the police and they were told that he will be let off after investigating the matter. However, he was subsequently involved in this case.

After appreciating the entire evidence, all the three appellants have now stand convicted and sentenced as indicated above.

I have heard Mr. R.S. Mamli, Advocate representing appellant Ram Paul Singh, Mr. G.S. Bhatia, Advocate representing appellant Gurcharan Singh and Mr. J.S. Bains, Advocate representing appellant Amarjit Kaur and Mr. M.S. Sidhu, Senior Deputy Advocate General, Punjab. With their assistance, I have also gone through the entire record.

Taking the lead and defending the case of Ram Paul Singh appellant, Mr. Mamli at the very outset submits that the conscious possession of Ram Paul Singh driver is not proved to the hilt. Simply because he was on the steering of the vehicle, it cannot be presumed that he was aware of the fact as to what was being carried in the jeep. He then submits that no doubt he has pleaded that he was not the driver of the said jeep but assuming for the sake of argument even if the case of the prosecution is taken as it is qua him, still it can not be said that he had the possessory title over the five bags. There is every possibility that the said bags allegedly recovered from the jeep could be of the other two accused or may be one of them who were also travelling in the said jeep. The conscious possession is the core ingredient under the Act and in the absence

of the said proof, the conviction cannot be maintained. Mr. Mamli while relying upon a latest judgment of this Court rendered by Full Bench in ***Kashmir Singh Vs. State of Punjab, 2006 (2) RCR (Crl.) 477*** submitted that even otherwise no specific question was put to Ram Paul Singh or as a matter of fact to other two appellants also with regard to conscious possession while recording their statement under Section 313 Cr.P.C. and, therefore, no presumption under the Act can be drawn against them.

According to Mr. Mamli, there is another flaw in the case of the prosecution which dents it to a great extent. The Investigating Officer had shown a favour to Jagsir Singh (PW1), the owner of the vehicle by not investigating the case in the right direction. Rather on the other hand, he was shown in the list of the witnesses and ultimately he did not support the case of the prosecution during trial. As per the record produced by concerned official of DTO Office, Moga, the jeep in question was registered in the name of aforesaid Jagsir Singh son of Tara Singh and the Investigating Officer was very much aware of this fact as he had recorded the statement of the said official under Section 161 Cr.P.C. during investigation. Therefore, it was incumbent upon him to carry out the investigation in the right of direction to bring it to a logical end. According to learned counsel, aforesaid Jagsir Singh should have been booked under section 25 of the Act and once it is not done, it can safely be inferred that a favour has been shown to him which in turn adversely affects the entire case of the prosecution.

Mr. Mamli then submits that not only the aforesaid flaw weaken the case of the prosecution, the recovery effected in this case is not getting corroboration from any independent witness and this lacuna may also be considered against the prosecution.

Mr. Mamli lastly submits that after effecting the recovery, the seal used in this case was kept by the police throughout and, therefore, chances of tampering with the case property cannot be ruled out. The delay in sending the sample in the present set of circumstances would, therefore, assume importance as the entire case property which included the sample, remained with the police only till the sample reached the hands of Analyst. In order to shatter the case of the prosecution on the aspect of link evidence, Mr. Mamli then submits that may be a sample seal chit was prepared at the spot as stated by the Investigating Officer, but it was never deposited with the MHC Sukhdev Singh by him as is clear from his affidavit Ex.PM and, therefore, possibility of the same being prepared subsequently cannot be ruled out. In the same strain, the learned counsel submits that even the FSL Form was not prepared at the spot and all these infirmities have been taken as serious flaws as per various latest judgments of this Court.

On the basis of the aforesaid submissions, Mr. Mamli prays for acquittal of Ram Paul Singh appellant.

Mr. Bhatia while adopting the argument advanced by Mr. Mamli on the point of conscious possession and the other flaws with regard to the link evidence, further submits that the case property when produced

before the Court was in torn condition and, therefore, could not be identified. He then submits that the affidavits tendered by the prosecution witnesses are discrepant with regard to the link evidence, the collective effect of which would be that the case of the prosecution is not free from doubt against any of the appellant. He has also drawn my attention to certain discrepancies crept in the statements of the official witnesses to the recovery.

Mr. Bains virtually adopts the arguments advanced by the other two counsel.

Repudiating the submissions advanced on behalf of the appellants, Mr. Sidhu submits that there is no reason to disbelieve the statements of the official witnesses who were incidentally present at a Naka and noticed the jeep coming from a particular direction. He then submits that no convincing explanation has been put forth by the appellants in their defence except three defence witnesses produced by Ram Paul Singh appellant who stated that he was picked up by the police from his house, which in any case cannot be of any help to him as no grouse/resentment was shown in writing from his side moving the higher/superior officials. According to the learned counsel, there could not be any reason for the Investigating Officer to implicate them falsely in a case of such type of recovery in which a lady (Amarjit Kaur) was also found involved in transporting the contraband. Therefore, none of the appellants has any escape in this case and their conviction as recorded by the trial Court,

deserves to be upheld.

After hearing rival contentions of the learned counsel of either side and going through the record, I am of the considered view that the prosecution has not been able to prove its case against any of the appellants and as such all the three appellants deserve acquittal. I am taking up all the aspects of the case collectively while entering into a detailed discussion.

The conscious possession of the Narcotic is the core ingredient to be established before the accused is subjected to punishment under the Act. The prosecution has to prove the intelligent possession and the culpable state of mind. Even close proximity of the object, cannot be said to be enough for the purpose of maintaining the conviction. While dealing with aspect elaborately, their Lordships of Apex Court in ***Avtar Singh Vs. State of Punjab, 2002 (4) R.C.R. (Criminal) 180*** while setting aside the conviction as maintained by this Court, in a case where recovery of 16 bags from a truck and two persons were sitting on the back and one on the steering of the truck, have observed that the word 'possession' no doubt has different shape of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together, but the minimum requisite elements which has to be satisfied, is the custody or control over the goods. For reference the relevant para of the aforesaid judgment is reproduced as under:-

> " Possession is the core ingredients to be established before the accused in the instant case subjected to the punishment under Section 15. If the accused are found to be in possession of

poppy straw which is a narcotic drug within the meaning of Clause (xiv) of Section 2, it is for them to account for such possession satisfactorily; if not, the presumption under Section 54 comes into play. We need not go into the aspect whether possession must be conscious possession. Perhaps taking clue from the decision of this Court in **Inder Sain v. State of Punjab, 1983(2) SCC 372** arising under the Opium Act, the learned trial Judge charged the accused of having conscious possession of poppy husk. Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution satisfactorily proved the fact that the accused were in possession of poppy husk. Accepting the evidence of PW-4- the Head Constable, it is seen that appellant No.3 (accused No.4) was driving the vehicle loaded with bags of poppy husk. Appellants 1 and 2 (Accused Nos. 1 and 2) were sitting on the bags placed in the truck. As soon as the vehicle was stopped by ASI (PW-2), one person sitting in the cabin by the side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. The word 'possession' no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together by the minimum requisite element which has to be satisfied in custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants-one of whom was driving the vehicle and other two sitting on the bags, were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle. One of

the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scare after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be custodian of goods whether or not he was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance, if they are labourers engaged merely for loading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction under Section 15 may not be warranted. At best, they may be a bettors, but there is no such charge here. True, their silence and failure to explain circumstances in which they were travelling in the vehicle at the odd hours, is one strong circumstance that can be put against them. A case of drawing presumption under Section 114 of the Evidence Act would perhaps be made out then to prove the possession of the accused, but the fact remains that in the course of examination under Section 313, Cr.P.C. not even a question was asked that they were the persons in possession of poppy husk, placed in the vehicle. The only question put to them was that as per the prosecution evidence, they were sitting on the bags of poppy husk. Strangely enough, even the driver was questioned on the same lines. The object of examination under Section 313, it is well known, is to afford an opportunity to the accused to explain the circumstances appearing in the evidence against him. It is unfortunate that no question was asked about the possession of goods. Having regard to the charge of which appellants were accused, the failure to elicit their answer on such a crucial aspect as possession, is quite significant. In this state of things, it is not proper to raise a

presumption under Section 114 of the Evidence Act nor is it after to conclude that the prosecution established beyond reasonable doubt that the appellants were in possession of poppy husk which was being carried by the vehicle. The High Court resorted to presumption under Section 35 which relates to culpable state of mind, without considering the aspect of possession. The trial Court invoked the presumption under Section 54 of the Act without addressing itself to the question of possession. The approach of both the courts is erroneous in law. Both the courts rested their conclusion on the fact that the accused failed to give satisfactory explanation for travelling in the vehicle containing poppy husk at an odd hour. But, the other relevant aspects pointed out above were neither adverted to nor taken into account by the trial court and the High Court. Non-application of mind to the material factors has thus vitiated the judgment under appeal."

The onus to prove the absence of culpable mental state lies on the accused. In **Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat, (2000) 2 SCC 523**, their Lordships of the Apex Court while dealing with this issue have observed that the burden of proof cast on the accused under Section 35 of the Act can be discharged through different modes. One is that he can rely on the materials available in the prosecution evidence. Next is that he can elicit answers from the prosecution witnesses through cross-examination to dispel any such doubt and he may also adduce some other evidence when he is called upon to enter his defence. In other words, if circumstances appearing in the prosecution case or in the prosecution

evidence are such as to give reasonable assurance to the court that the accused could not have the knowledge or the required intention, the burden cast upon him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter his defence.

While dealing with the presumption envisaged under Sections 35 and 54 of the Act, this Court in its Full Bench judgment rendered in **Kashmir Singh Vs. State of Punjab, 2006(2) RCR (Crl.) 477** has observed that the presumptions envisaged under the Act are questions of fact depending upon the case and it appears to be very difficult to lay down any specific mode and method in which the presumption can be raised. The facts in each case are different and the witnesses testify differently. Finally, it was observed that no presumption under Sections 35 and 54 should be used against the accused unless he has been given an opportunity to rebut the presumptions in his statement under Section 313 of the Code of Criminal Procedure by being called upon to explain the circumstances which give rise to the presumptions.

I am taking up the case of Ram Paul Singh driver first of all, keeping in view the guidelines enunciated by the aforesaid decision.

The evidence collected by the prosecution during investigation was that Jagsir Singh son of Tara Singh (PW1) was the owner of the jeep No.UP80-B9222 in which the contraband was being carried. Joginder Singh Investigating Officer did not book him under Section 25 of the Act.

The reason is very clear as emanates from his statement Ex.PX recorded under Section 161 of the Code of Criminal Procedure. No doubt, he has been confronted with his previous statement by the Public Prosecutor as he did not support the case of the prosecution but one fact is very clear that during the investigation he had disclosed before the police that he had kept Ram Paul Singh appellant as driver on the aforesaid jeep and on 8.5.1997, the date of alleged recovery, he had given his jeep to Ram Paul Singh driver on the rent of Rs.400/- as he had to carry the passengers of his village. The explanation given by Jagsir Singh, the registered owner during the investigation weighed with the Investigating Officer and, therefore, he was not booked under Section 25 of the Act. But from the aforesaid facts, it is evident that Ram Paul Singh was the driver on the said jeep.

The next question now crops up before me is that may be Ram Paul Singh was found driving the aforesaid jeep from which five bags of poppy husk was allegedly recovered, the said fact alone would be enough to hold that he had the intelligent/conscious control over the said bags, especially when two other persons including a lady who hails from the village of Ram Paul Singh appellant only. In my view, in the given set of circumstances, it is difficult to hold as to who in fact had the custody and control over the said bags. Factually, somewhat same was the position in **Avtar Singh's case (supra)** wherein 16 bags of poppy husk were being carried in a truck and their Lordships on the point of custody and control of the bags not only acquitted those two persons who were sitting over the

bags but also the person who was on the steering of the truck.

I take the case of the prosecution weak qua Ram Paul Singh appellant in the light of a latest judgment of Full Bench rendered in ***Kashmir Singh's case (supra)*** wherein while dealing with the presumption envisaged under Sections 35 and 54 of the Act, this Court has observed that the presumption under the Act would depend upon the facts of each case as it is very difficult to lay down any specific mode and method in which presumption can be raised but finally observed that no presumption under Sections 35 and 54 would be used against the accused unless he is given an opportunity to rebut the same by calling him to explain the circumstances when his statement under Section 313 Cr.P.C. is recorded. In the case in hand, all the facts qua the present three appellants with regard to the conscious possession are so intermingled and intertwined that segregation of the one of the accused has the impact on the case of the other accused. Therefore, as per the facts in hand, the presumption under Sections 35 and 54 of the Act cannot be drawn against any of the appellants.

It needs to be mentioned here that appellant Ram Paul Singh has made an attempt to discharge the onus envisaged under Section 35 of the Act by producing the defence witnesses from his village. But assuming for the sake of argument, even if the accused does not enter into defence by adducing any evidence in support of his plea, still he can discharge the onus by highlighting the circumstances appearing in the prosecution case so as to give reasonable assurance to the Court that he could not have the knowledge

or the required intention of being in conscious possession of the contraband (Narcotic) as held in ***Abdul Rashid Ibrahim Mansuri's case (supra)***. In my considered view, the facts of the present case when taken collectively go to show that the prosecution is miserably failing to prove the conscious possession of the appellant Ram Paul Singh may be he was allegedly found sitting on the steering of the aforesaid jeep No. UP80-B9222 which was owned by Jagsir Singh (PW1). This weakness not only comes to the rescue of Ram Paul Singh appellant alone but lends advantage to the case of the other two appellants also.

Before I take up the other vital flaw in the case of prosecution, I would like to discuss the aspect of conscious possession qua the other two appellants, who were allegedly found sitting in the jeep. As stated above, Amarjit Kaur is also resident of village Rajiana, the village of aforesaid Ram Paul Singh appellant. Simply that she is from the village of Ram Paul Singh appellant and was found in the jeep, that fact by itself cannot be said to be a ground enough to hold that she in fact was in conscious possession of the contraband being carried in the jeep in which she was travelling. Therefore, the issue for consideration before me is as to whether Gurcharan Singh appellant, who was resident of village Boparai (District Ludhiana) and Amarjit Kaur wife of Gurdip Singh, resident of Rajiana had the possessory right over the contraband.

In ***Tarsem Singh Vs. State of Punjab, 2005 (4) RCR (Criminal) 300*** a Division Bench of this Court while dealing with this very

aspect entered into a detailed discussion over the charge of possession and referring to another Single Bench decision of this Court in Criminal Appeal No.298-SB of 1999 decided on 12.5.2005 observed as under:-

> " The substratum of the charge is that the appellant and his co-accused were found in possession of 5 quintals and 52 Kgs. of narcotic substance but unfortunately there is no evidence as regards the nature of their possession. The word "possession", according to the Shorter Oxford English Dictionary, Volume II, Third Edition means:-
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> > "The visible possibility of exercising over a thing such control as attaches to lawful ownership; the detention or enjoyment of a thing by a person himself or by another in his name the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons; esp. the having of such exclusive control over land, in early instances sometimes used in the technical sense of SEISIN 1535."
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> According to Webster's Third New International Dictionary, Volume II, the word "possession" means:
> "the act or condition of having in or taking into one's control or holding at one's disposal".
>
> The word "possession" according to the New Encyclopaedia Britannica, Volume 9, 15th Edition means:-
> "the acquisition of either a considerable degree or physical control over a physical thing, such as land, or chattel, or the legal right to control intangible property,

such as a credit.---with the definite intention of ownership.

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Thus, possession tends to be regarded as prima facie evidence of the right of ownership; it gives this right against everyone except the rightful owner. Mere possession by a father is sufficient to provide grounds for an action against one who deprives him of the object with no better right than his own".

The meaning of word "possession" is given in Halsbury's Laws of England, Volume 35, Fourth Edition as under:-

> "Possession may mean legal possession; that possession which is recognised and protected as such by law. The elements normally characteristic of legal possession are an intention of possessing together with that amount of occupation or control of the entire subject matter of which it is practically capable and which is sufficient for practical purposes to exclude strangers from interfering. Thus, legal possession is ordinarily associated with de facto possession; but legal possession may exist without de facto possession, and de facto possession is not always regarded as possession in law. A person who, although having no de facto possession, is deemed to have possession in law is sometimes said to have constructive possession.

In Corpus Juris Secundum, Volume LXXII, the word "possession" means:-

> "In law, the term is defined as meaning an act, fact, or condition of a person having such control of

property that he may legally enjoy it to the exclusion of others having no better right than himself; the physical control of a thing which belongs of right to unqualified ownership in such a manner as to exclude control by other persons."

From the above, it is clear that the word "possession" would necessarily imply some degree of control over the goods possessed. The investigating agency in its wisdom has chosen not to lead evidence to prove that the capacity in which these three persons were connected with the truck, which was carrying the narcotic substance. There is no evidence to show the manner in which one of the accused had exercised actual control over the goods recovered for in law possession, as already indicated, would necessarily imply power or control similar to lawful ownership, which enables the person in control to deal with the articles possessed and not mere custody on behalf of some one else as may be inferable in case a person is transporting a consignment for the actual owner."

My view is also strengthened by another Division Bench Judgment of this Court rendered in **Raj Kumar Vs. State of Punjab 2005 (1) RCR (Criminal) 70** and also another latest judgment of a Division Bench of this Court rendered in **Sukhdev Singh alias Sukha Vs. State of Punjab, 2006 (1) RCR (Criminal) 4** wherein the accused was found sitting over the bags and it was observed that the prosecution could not prove that he was in conscious possession of the bags. The view of the Hon'ble Bench was that the police should have conducted further investigation to

prove that the accused was rightly in possession of those bags. Failure to give any explanation by the accused side for being present at a particular place, did not prove that he was in possession of those articles. While acquitting the accused in the aforesaid case, the Hon'ble Division Bench relied upon **State of Punjab Vs. Balkar Singh, 2004 (1) Supreme Court Cases 838** wherein the Hon'ble Supreme Court while dealing with the aspect of conscious possession of prohibited substance, in almost under the same set of circumstances wherein the accused were belonging to different villages, acquitted them observing that in all fairness the police should have conducted further investigation as to transportation of poppy bags to the place of incident, ownership of the poppy husk etc. to prove that accused was really in possession of those articles.

My view in this regard gets support from two other Single Bench Judgments rendered by this Court in **Joga Singh Vs. State of Punjab, Criminal Appeal No.472-SB of 2003** decided on May 22, 2006 and **Karnail Singh and another Vs. State of Punjab, Criminal Appeal No.1087-SB of 2000** decided on June 7, 2006.

May be I find the aforesaid vital weakness enough to discard the entire case of the prosecution qua all the three appellants, still I would like to demonstrate another flaw with regard to the link evidence. It is repeatedly observed in many judgments that an offence committed under the Act is a grave one and, therefore, procedural safeguards to the accused provided under the statute require strict compliance. After all stringent

provisions for punishment have been provided under the Act wherein minimum sentence of 10 years and a fine of Rs.1.00 lac is to be imposed for being found in conscious possession of non-commercial quantity of Narcotic. Before the prosecution seeks conviction under the Act, it is incumbent upon it to see that there is no procedural lapse at least on vital aspects. One of the vital aspect is the link evidence. If the prosecution is stumbling on that aspect, the benefit has to be extended to the accused.

In the case in hand, the prosecution case is resting upon the statement of two main witnesses to the recovery i.e. Joginder Singh (PW2), the Investigating Officer and ASI Harpreet Singh (PW3). I, however, do not doubt the case of the prosecution on account of non-joining of independent witness as contended by Mr. Mamli as the recovery was effected at 9.00 P.M. Possibly there could not be any independent person at that time. Still in my view, no latitude can be extended to the prosecution for certain procedural lapses in the investigation. According to the statement of aforesaid Joginder Singh, he had prepared the sample of the seal Ex.P2 which was retained at the spot. Admittedly, neither any FSL form (Form No.29) was prepared at the spot nor it was deposited with the concerned police official who was the incharge of the Malkhana (MHC). Non-preparation of the said form at the spot has been considered as a serious lacuna in the investigation as held repeatedly by this Court in its various judgments. One such judgment is reported as **Bhola Singh Vs. State of Punjab, 2005 (2) RCR (Crl.) 520.**

The factual situation in the present case is that the sample impression chit was not deposited with MHC as is clear from his affidavit Ex.PM. Tara Chand PW5 also does not talk about the said sample chit. Giving some concession to his statement as he had got the docket prepared from the office of S.S.P. Moga, and went to the office of Forensic Science Laboratory, Punjab for depositing the samples. The form which was received by the Analyst also shows that the sample chit is pasted on it. Be that as it, the doubt still lurks in the mind of the Court that this all could be done any time before 13th of May, 1997 on which date the sample was deposited in the said laboratory. The lacuna remains as to whether the sample chit was actually prepared on 8.5.1997, the alleged date of recovery or not. Had it been deposited on the same day, concerned police official (MHC) would have certainly said about this fact in his affidavit. But the same fact is missing.

Another point which is worth consideration is that the seal remained with the Investigating Officer for all the five days i.e. upto 13.5.1997. It is the duty of the prosecution to prove beyond any shadow of doubt that till the case property has been despatched to the place of FSL, the seal should not be available to the prosecution agency and in the absence of such safeguards the possibility of samples being tampered with, the substance being changed and even the container(s) being resealed cannot be ruled out. In a latest judgment of Hon'ble Supreme Court rendered in **Ritesh Chakravarti Vs. State of M.P., 2006 (4) RCR (Criminal) 481**

while taking up the other flaws in the case of the prosecution and acquitting the accused, their Lordships also observed that all the procedural safeguards to the accused provided under the statute require strict compliance, as by reason of the provisions of the Act, Parliament has reposed confidence on the Officers.

Since I am dislodging the case of the prosecution on the aforesaid two material infirmities which, in my view, are enough to extend benefit to the appellants, I do not feel the necessity of entering into detailed discussion with regard to the merits of the other submissions advanced by learned counsel for the appellants.

As a sequel to the aforesaid discussion, the net result is that the prosecution has failed to bring home the charge of Section 15 of the Act qua any of the appellants. Consequently, I allow all the three appeals bearing Nos.969-SB of 2002, 1274-SB of 2002 and 793-SB of 2006 and acquit appellants Ram Paul Singh, Gurcharan Singh and Amarjit Kaur of the charge. They are stated to be in custody and shall be released forthwith if not required in any other case.

[Virender Singh]
Judge

December 22, 2006
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